Supreme Court, U.S.
FILED

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No.

In the
Supreme Court of the United States

ANIVAL PUNZO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

BRIAN M. COLLINS
Counsel of Record
70 West Hubbard Street
Suite 302
Chicago, Illinois 60610
(312) 755-0303

Counsel for Petitioner

Midwest Law Printing Company/Photex — Chicago — (312) 431-0185

Oral Argument Requested

QUESTIONS PRESENTED FOR REVIEW

The violations of the warrant requirement of the Fourth Amendment to the United States Constitution should preclude any finding of a consensual search because the investigating officers, a combination of Federal Agents, task force officers and Chicago Police Officers

(A) made a determined decision to not seek a search warrant because they might have to name their informant in the affidavit in support of such a warrant;

(B) had indisputably 4 or more hours to obtain a search warrant that could have been obtained within one hour;

(C) during which time they had the proposed search area surrounded thus precluding removal of any contraband suspected of being within the premises or the removal of any persons;

(D) and during which time they illegally searched the garage observing the contraband they wished to seize and then did seize without the benefit of a warrant.

The Court should invoke its concern not only with the privacy interest inherent in the Fourth Amendment, but also with considerations of deterrence and judicial integrity.

RULE 29.6 STATEMENT

All parties to the proceeding are listed in the case caption. There are no corporate parties.

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STATEMENT OF JURISDICTION

The Court of Appeals filed its order affirming the judgment of the District Court on December 12, 2006 (1a); this Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

18 U.S.C § 2, § 924 (C) (1) (A), 3231, 21 U.S.C. § 841, (a) (1), § 846 28 U.S.C. § 1291, Fed Crim. P. 11 (a) (2) this matter involved a conditional plea of guilty pursuant to Rule 11 (a) (2), Fed. Crim. Proc. 11 (a) (2).

STATEMENT OF THE CASE

This case involves a four (4) count superceding indictment filed in 2005 against two (2) co-defendants, Anival Punzo and Saul Cerna. Co-defendant Cerna is a fugitive. The indictment charges defendants under 18 U.S.C § 2, and 21 U.S.C. § 841, (a) (1), and 846 with possessing with intent to distribute in excess of five kilograms of cocaine, and conspiracy of same, from on or about March 2002 through April 26, 2002. Further, defendant was charged under 18 U.S.C § 924 (c) (1) (A) with knowingly possessing firearms in furtherance of a drug-trafficking crime: Defendant filed a Motion to Suppress the cocaine and other evidence which were seized by law enforcement officers in a warrantless search of defendant's house and garage. After an evidentiary hearing, the District Court denied defendant's Motion finding that defendant's father had given a valid consent. Pursuant to a plea agreement, defendant conditionally pled guilty to Count One, conspiracy with intent to distribute cocaine, and was sentenced to one hundred and eighty (180) months in prison on September 29, 2005. The plea agreement reserved defendant's right to appeal the denial of his Motion to Suppress.

Defendant filed a Notice of Appeal to that order denying his Motion to Suppress on October 6, 2005 which was docketed on October 7, 2005. The United States Court of Appeals 7th Circuit sustained the ruling of the District Court on December 12, 2006.

STATEMENT OF FACTS

This matter involves the warrantless search of the residence of Anival Punzo and Guadalupe Punzo on April 26, 2002. The house and adjoining garage were located at 3239 S. 54th Avenue.

The search videotape of the garage interior was played with Agent Murphy on the witness stand. It showed a Lincoln automobile parked on the right side of the garage. There were no boxes positioned on the floor on the left side of the garage as they were when she first saw them. Agent Murphy testified that the left side of the garage did not have enough space for a vehicle to fit, whether an Expedition or a Pinto. The District Court concurred that it was unlikely. (App.9)

Law enforcement officers, working with a confidential informant planned a controlled purchase of narcotics. In doing so they provided a Ford Expedition equipped with G.P.S system to monitor the vehicle's movement. It moved to an area close to the Punzo home. One of the agents testified that the Expedition pulled into the Punzo garage.

Lindsay Murphy testified that she is an agent for the Immigration and Customs Enforcement and is an assistant special agent in charge. She was supervising the investigation regarding the Punzo home on April 26, 2002. She instructed several of the officers to conduct a knock and talk at the Punzo house to see if they could get permission to search the residence as well as the garage. This occurred after hours of surveillance.

Prior to entering the Punzo house, Agent Murphy decided not to obtain a federal search warrant. After she and other officers surrounded the house, but before the consent was received, Agent J.R. Estes opened the back door of the garage at that location. He observed what he believed to be narcotics and advised Agent Murphy.

After she was advised that consent had been obtained, she entered the house. She was not shown nor did she ask to see a signed consent form. She has never seen consent forms regarding the search of the residence and garage for 3239 S. 54th Ave.

The boxes with narcotics taken from the garage were transported to a police station at about 2:30 p.m. A person, later known to her as Guadalupe Punzo, came to the house sometime after 2:00 p.m. and possibly as late as 2:30 p.m. The written consent form that was taken from Guadalupe Punzo would have been taken after both house and garage had already been searched.

Agent Murphy had a conversation with Mr. Punzo when he arrived at the house. She read him Miranda rights about 4:30 p.m. There were more written consents taken from the Punzo's that day, in connection with the search videotape made on April 26, 2002 while she was at the location. It was made by Agent J.R. Estes. There was no videotape recording of Manuel Punzo giving consent or by Guadalupe Punzo to search the residence or the garage. Agent Murphy did not direct Agent Estes to make recordings of verbal consents by Manuel Punzo or Guadalupe Punzo to the search of the house and the garage. The interview of Anival Punzo was not recorded on videotape.

Agent Murphy testified that during a recent interview by prosecutor Ricardo Meza she told him that she saw Agent Estes push open the back door of the detached garage located at 3239 S. 54th Ave., and after pushing open the

door Agent Estes gestured to her as if there was something inside the garage.

Gerald Lau testified that he has been a Chicago Police Officer for approximately 22 years. During April of 2002 he was working in the Narcotics Unit. He had worked there for 12 years. At approximately 1:00 p.m. on April 26, 2002, he and two other officers approached the front door of the residence at 3239 S. 54th Ave. Upon identifying themselves to Manuel Punzo, they asked if they could come in and talk to him, he said yes. Officer Lau then asked Manuel Punzo if he had any weapons on him and whether or not he could search him. He patted Manuel Punzo down, and Manuel Punzo provided him some sort of picture identification. The identification had a different address from defendant's house.

Manuel Punzo told them that the house was his son's house. He told Officer Lau that he was keeping an eye on his son's house because he was expecting some sort of delivery. Officer Lau then asked him if he would mind if they searched the residence and the garage. According to Lau, Manuel Punzo told them it was okay to search. Officer Lau got a consent to search form and handed it to Manuel Punzo. The form contained blank spaces. Manuel Punzo signed the form, then handed it back to Officer Lau who then signed the form. He never filled out the rest of the form.

Officer Lau testified that he has experience in obtaining search warrants. It is a fairly quick process. There are state prosecutors on duty 24 hours a day 7, days a week to assist him in obtaining a search warrant. However, he never took any steps to obtain a search warrant. Agent Murphy never told him to get a search warrant.

Officer Lau entered the house with two other people. He had his gun drawn. Within a minute of Lau entering the house, several other police officers entered the house. The rest of the officers entered through the back door. He did not know how many there were.

Officer Gerald Lau testified that within 60 seconds after he and two other officers entered the Punzo house several other officers entered. He entered with his gun drawn at his side. He did not know whether the other officers had their guns. Officer Lau patted down Manuel Punzo as soon as he entered the house. He took Manuel Punzo's wallet. This was done without Manuel Punzo's consent. Manuel Punzo told him that he, Manuel did not live there.

The consent to search form that Office Lau handed to Manuel Punzo was not filled out. Officer Lau did not ask Manuel Punzo if he could understand what was on the form. He testified that he handed the form to Manuel Punzo just a few minutes after he entered the premises. At that time there were several other officers in the kitchen.

Officer Lau had been surveilling the house for approximately 3 hours before they entered. Prior to his knocking on the door, the house and garage were surrounded by officers. Everyone was waiting to enter once Officer Lau obtained consent to search. He knew that no one had gotten a search warrant. He knew consent was necessary to legally justify a search of the house and garage. He did not read the consent to search form to Manuel Punzo and did not hear Punzo read the form to himself. He did not ask any of the Spanish speaking officers to read the form to Mr. Punzo.

Officer Lau testified that he signed the form after Mr. Punzo signed it. He said he was present when Officer Honore signed the form in the living room. Officer Ramirez wrote in "Narcotics Section No 189", and Officer Ramirez wrote "1305" on the form. Ramirez filled in the form

sometime later in the office. Manuel Punzo was not free to leave the house after Officer Lau entered the house.

Officer Lau identified the consent to search form of Guadalupe Punzo. He testified that he signed it along with Officer Honore shortly after Guadalupe signed it. If the form says "1330", he signed it after that. He believed that Officer Ramirez wrote the time on the form. The form was blank just like the other form. On May 24, 2004 he told prosecutor Meza, that the black portions of the form were filled out later by a separate officer.

Officer Lau testified that he never changed the times that are listed on the top of the consent to search form. He did not see anyone else do that. He did not speak to any officers or ask anyone to change the times.

Officer Neumann testified that on November 19, 2003 he was in Surprise, Arizona to execute the arrest of the Defendant Anival Punzo. He interviewed Anival Punzo at that time.

It was stipulated that if U.S. Customs Agent J.R. Estes were called to testify he would testify that prior to obtaining a consent to search the Punzo garage on April 26, 2002 he did push open the door to the garage located on 3239 S. 54th Avenue. He went inside the garage and saw opened boxes. Based upon his experience J.R. Estes believed the boxes contained drugs and so indicated to Agent Murphy.

Charles Honore testified that he is a Chicago Police Officer and that on April 26, 2002 at about 1:00 p.m. he participated in the search of a house and garage located at 3239 S. 54th Avenue in Cicero. He was in the living room when Officer Lau presented Manuel Punzo with the consent form. Officer Honore testified that he believed he would have filled out the date and time and the witness portion which he would have signed later at the police station. The handwritten names Officer Lau and Officer

Honore are not his handwriting. "Narcotics section 189" is not his handwriting, and "Residencia y garage" are not his handwriting.

Officer Honore remembered that Guadalupe Punzo arrived at the residence about 1:30 or so. He came to that recollection by speaking with the other officers. Officer Lau handed Guadalupe Punzo a consent to search form. There were blanks on that form and none of them were filled in with writing at the time. The date and time were written on that form in Honore's presence at the station. He also wrote Officer Lau's name and star number and his own name and star number at the station. He filled in the location of the places to be searched at the station. He does not know who wrote the name Guadalupe Punzo on that form.

Officer Honore testified that he wrote the number "1330" on the form. He wrote over a number that was already on the document. That number was intended to serve as the time that the consent to search was presented to Guadalupe Punzo. He changed the number when Officer Ramirez spoke to him. He did not use white out. He did not see anyone else use white out on Guadalupe's consent to search form.

Ellen Mulchrone Schuetzner is a forensic documents examiner. She testified that as an expert witness that on Manuel Punzo's consent to search form "1305" in the time box was overwritten. What that means is that the figure "1305" was written over something else, another number.

Ms. Schuetzner examined Guadalupe Punzo's consent to search form microscopically which revealed there were actually two different inks an opaque ink fluid used to form the number in the "time" blank. After the number "1330" was written over the "1430", an opaque ink material similar to white out was used to obliterate part of the number "4". Punzo Exhibit 93 (App. 19) is a picture of the

monitor that was used to examine a document with infrared. It was already an infrared image of the underlying ink on the consent form and shows that the number is "1430". There is an indication on both consent forms that the words "Narcotics Section" which is written on each of those forms appears to be done by two different inks: blue and black in ball point.

Manuel Punzo is the father of Anival Punzo. On April 26, 2002 he lived on 3245 S. 57th Court, Cicero. On that day he went to his son's house to wait for someone to show up at the house. Eventually, at about 12:00 or 12:30 p.m. he went into the house. He began to watch his favorite TV program, "Monica". This program began at 1:00 p.m. As he opened the door at least 5 persons entered with guns in their hands. He was pushed to the sofa. At least 5 persons had guns pointed at Punzo. They questioned and yelled at him "where is the other people". Two persons remained with him while the rest of the people began searching the house. The two people who remained questioned him. They put him against the wall and searched his pockets, then asked for identification. He showed them his license.

While this was occurring to him the other officers were still searching the house. They asked Punzo to sign a form about 25 or 30 minutes after they entered the house. Manuel could not read the paper because he was in shock and he did not have his glasses. He eventually signed his name at the bottom of the paper because he was under pressure and felt that he had no choice.

He believed that his daughter-in-law Guadalupe Punzo came home at about 2:30 p.m. or at 2:45 p.m.

Homero Ramirez testified that he was a Chicago Police Officer in April of 2002 assigned to the Narcotics Section. He filled in the blanks on the Manuel Punzo consent form on April 26, 2002 at the police station. He wrote "Mr. Manuel Punzo, Officer Lau, Officer Honore, Narcotics

Section 189, residencia and garage" and the date. He did not recall who told him to put the name Manuel Punzo in the blank space toward the top of the consent. He testified that Officer Lau, who was present at the time, did not write his own name on the document because he cannot read Spanish.

Officer Ramirez testified that Guadalupe's consent form, does not contain any of his writing. He did not recall telling Officer Honore to change particular numbers beneath the blank space "time". He was one of the officers present at the time the consent was inventoried, but he did write on the inventory document. He testified that he did not make any changes to the Manuel Punzo consent to search form under the "time" blank.

Officer John Lewis testified that he did not participate in a search of the residence at 3239 S. 54th Ave. on April 26, 2002. He testified that he inventoried Exhibit 4, (App.15) the Manuel Punzo consent form, on April 26, 2002. In his experience as a narcotics officer, it is not customary to fill in consent forms with officers' names and signatures and the place to be searched while at the police station after the search had already occurred.

Upon being shown Exhibit 98, a photocopy of the arrest report for Manuel Punzo, he did recall he typed that document. He had talked to the arresting officer in order to be able to get information as to the time of arrest. He filled out an arrest report for Guadalupe Punzo. He put the arrest time as 2:30 p.m. on April 26, 2002 after he talked to the officers. He describes Punzo Exhibit 90 as the arrest report of Saul Cerna. The time of arrest of Saul Cerna was 8:55 a.m. on April 26, 2002. He was present for the arrest of Cerna.

Guadalupe Punzo testified that she is the wife of Anival Punzo, and on April 26, 2002 she drove to her home at 2:45 or 3:00 p.m.

When Guadalupe entered the house she was told to sit down on the bed in her son's room. The officer told her to sign a piece of paper. She went to pick up the paper to read, and he took it out of her hand. He told her to sign it. So she signed it and gave it back to him. It was about 3:10 p.m.

REASONS FOR GRANTING THE PETITION

The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain a voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained. *Illinois v. Rodriguez*, 497 U.S. 177, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990); *U. S. v. Matlock*, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974), *Georgia v. Randolph*, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006).

To the Fourth Amendment rule ordinarily prohibiting the warrantless entry of a person's house as unreasonable per *se Payton v. New York*, 445 U.S. 573, 568, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1974), one "jealously and carefully drawn" exception, *Jones v. United States*, 357 U.S. 493, 499, 78 S. Ct. 1253, 2 L. Ed. 2d 1514 (1958), recognizes the validity of searches with a voluntary consent of an individual possessing authority, *Rodriguez* 497 U.S., at 181, 110 S. Ct. 2793. That person might be the householder against whom evidence is sought, *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), or a fellow occupant who shares common authority over the

property, when the suspect is absent, *U.S. v. Matlock*, 415 U.S. 164, 170, 94 S. Ct. 988, 39 L. Ed. 2d 242, and the exception for consent extends even to parties and searches with the permission of a co-defendant whom the police reasonably, but erroneously, believed to possess shared authority as an occupant. *Rodriguez*, Supra at 186. Manuel Punzo, while the father of the defendant, was not a co-occupant, but merely a house-sitter awaiting a delivery.

The entry by the law enforcement officers in this case followed the arrest of the only person who could have provided probable cause to the officers at 8:55 a.m. on the day in question. The officers went to the location, surrounded it, and maintained their positions isolating the residence and garage until 2:30 or 3:00 p.m. During that time they made a conscious decision not to obtain a search warrant. It is clear from their testimony that they could have obtained a search warrant, if probable cause existed, within one hour. That gave them 5-6 hours in which to obtain a search warrant. The officers chose not to do so.

The Fourth Amendment prohibition against unreasonable searches and seizures protects persons in their homes against unwarranted intrusions. The exclusionary rule preventing the use of evidence obtained in violation of that amendment protects the Fourth Amendment guarantees by deterring lawless conduct by law enforcement officers and by "closing the doors of the Federal Courts to any use of evidence unconstitutionally obtained" *Brown v. Illinois*, 422 U.S. 590,598, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975); *Wong Sun v. United States*, 371 U.S. 471, 486, 83 S. Ct. 407, 9 L. Ed. 441 (1963). Therefore, in examining whether the exclusionary rule applies in this case, we are concerned with the considerations of deterrence and judicial integrity. *United States v. Robeles-Ortega*, 348 Fed. 3rd 679, 681 (7th Cir. 2003).

Considerations of deterrence and judicial integrity are significant considerations in this case. See *Brown v. Illinois*, Supra at 599,600. When considering factors described in *Brown*, (1) the temporal proximity of the illegal entry and the consent, (2) the presence of intervening circumstances, and, particularly, (3) the purpose and flagrancy of the official misconduct, this case is a poster child for upholding the warrant requirement of the Fourth Amendment to the United States Constitution. With respect to the temporal proximity, the officers had 5-6 hours in which to obtain a search warrant, if that was legally possible, with respect to the presence of intervening circumstances, there were none other than exigent circumstances created by the police resulting in entering the premises without a warrant, and the purpose in obtaining evidence they could have obtained with a warrant if probable cause to search existed and was determined to exist by a neutral magistrate. The official misconduct should be deterred in this and other future cases. It certainly appears that the officers, or some of them, altered evidence (i.e. the consent forms) and were at least disingenuous about the testimony that the Expedition was in the Punzo garage. In cases like this when law enforcement officers have the opportunity, if it is legally possible, to obtain a search warrant and consciously determine not to do so, they should be deterred from such actions as occurred in this case. Even after 5-6 hours of sitting on the house the family was then detained for many more hours in the house after the search was completed and after any contraband was secured.

The primary reason for search warrant requirements is to interpose neutral and detached magistrates between citizens and the officers engaged in the often competitive enterprise of ferreting out crime, and those suspected of drug offenses are no less entitled to that protection than

those suspected of non drug offenses. *Unites States v. Karo*, 468 U.S. 705, 717,104 S. Ct. 3296, 82 L. Ed. 530 (1984)

Those seeking exception from the constitutional rule that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per *se* unreasonable under the Fourth Amendment must show that exigencies of the situation made the course imperative *Coolidge v. New Hampshire,* 403 U.S. 443, 455, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). These officers made the determination to ignore the neutral magistrate.

CONCLUSION

The decision of the United States Court of Appeals for the 7th Circuit upholding the decision of the United States District Court for the Northern District of Illinois should be reversed. It is in conflict with this Court's previous decisions as cited in the Petition. It most clearly doesn't follow this Court's mandate relating to the considerations of deterrence and judicial integrity.

Respectfully Submitted,

BRIAN M. COLLINS
Counsel of Record
70 West Hubbard Street
Suite 302
Chicago, Illinois 60610
(312) 755-0303

Counsel for Petitioner

APPENDIX

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

United States Court of Appeals
For the Seventh Circuit Chicago, Illinois 60604
Argued November 15, 2006
Decided December 12, 2006

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

No. 05-4187

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANIVAL PUNZO,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 03 CR-1075

Matthew F. Kennelly, *Judge.*

ORDER

After the district court denied Anival Punzo's motion to suppress drugs and firearms obtained during a search of his residence and inculpatory statements he made to police, Punzo entered a conditional guilty plea to conspiring

to possess more than five kilograms of cocaine in violation of 18 U.S.C. §§ 846, 841(a)(1). Punzo appeals the district court's denial of the motion to suppress. We affirm.

I

In April 2002, Immigration and Customs Enforcement agents arranged, along with a confidential source (CS), to set up a controlled purchase of approximately 100 kilograms of cocaine. Consistently with the plan, the CS rented a car and left it in a designated location. Police officers tailed the car to Punzo's garage. After the car left the garage, the police pulled it over and found 97 kilograms of cocaine. The driver, Saul Cerna, was arrested; the government reports that he is now a fugitive.

Officers then staked out the Punzo residence for several hours, but they did not seek a search warrant. During this surveillance, Agent J. R. Estes entered Punzo's garage and spotted open boxes containing what he believed to be drugs. He passed this information along to Agent Lindsey Murphy, the agent supervising the investigation. Shortly thereafter, Agent Murphy asked three officers, including Officer Gerald Lau, to "knock and talk" at the Punzo residence to ask for consent to search the house and garage. Manuel Punzo, the defendant's father (to whom we refer as Manuel, to avoid confusion), answered the knock at the door. Officer Lau's and Manuel's accounts of what happened next are very different.

Officer Lau's testimony, which the district court credited over Manuel's, was as follows. Officer Lau had his gun drawn and was holding it alongside his leg when he knocked on the front door. The officers identified themselves, and Manuel gave them permission to enter. Officer Lau asked Manuel if he had any weapons, and patted Manuel down. Manuel gave Officer Lau his license, which showed that Manuel lived at a different

location. Manuel explained that the house belonged to his son, who was at work. During this conversation, Office Charles Honore entered the home through a back door that the police had opened. Officer Honore checked two basement rooms to determine whether any other people were present, and then headed upstairs to the living room, where Officer Lau and Manuel were talking.

Officer Lau asked Manuel if the officers could search the house and the garage, and Manuel gave verbal consent. Officer Lau then handed Manuel a bilingual, preprinted consent form that advised him of his right to withhold consent, but none of the blanks in the form were filled in, including the blank that called for a description of the area to be searched. Officers Lau and Honore agreed that Manuel appeared to read the consent form before signing it on the Spanish side.

Manuel, on the other hand, says that when he opened the door, five or six plain-clothed and unidentified men rushed into the living room, pointed their guns at him, and shouted "Where are the people?" They pushed Manuel down onto a couch. Then at least five officers searched the house for other people while two other officers put Manuel up against a wall, searched him, checked his license, and questioned him with guns drawn. The officers handed him a form which Manuel was unable to read and which contained several blanks. The officers told him, "Sign this paper here," which Manuel interpreted as a demand, and he complied. After Manuel signed the consent form, officers found a machine gun and a handgun inside the house. In the garage, they found 191 kilograms of cocaine.

Anival Punzo arrived at the house sometime later. After hearing the *Miranda* warnings and waiving his rights, Punzo confessed that he had agreed to let a man named "Raul" store cocaine in his garage in exchange for $10,000. In a later confession, Punzo repeated this and identified Saul Cerna, the driver whom police had arrested on the morning of April 26th, as "Raul."

Punzo moved to suppress the physical evidence seized from his garage and his house and his inculpatory statements. After a three-day suppression hearing, the district court denied the motion to suppress. Punzo appeals, arguing that the district court erred (1) by crediting Officer Lau's testimony over Manuel's, (2) by finding that Manuel's consent was voluntary, and (3) by finding that Manuel's consent was not tainted by Agent Estes's illegal search of the garage and by Officer Honore's illegal sweep of the basement.

II

When reviewing a district court's denial of a motion to suppress, we apply the *de novo* standard to legal conclusions and the clear error standard to findings of fact. *United States v. Robeles-Ortega*, 348 F.3d 679, 681 (7th Cir. 2003). Clear error does not exist when the district court chooses between two permissible views of the evidence. *United States v. Marty*, 450 F.3d 687, 690 (7th Cir. 2006).

The question at the heart of this appeal-whether Manuel's consent was valid-depends largely on whether Manuel's or Officer Lau's version of events is credited. We therefore first address the question whether the district court erred when it believed Officer Lau. Credibility determinations "can virtually never be clear error," *United States v. Blalock*, 321 F.3d 686, 690 (7th Cir. 2003) (internal quotation marks omitted), and will not be disturbed unless they are "completely without foundation." *United States v. Ferguson*, 35 F.3d 327, 333 (7th Cir. 1994); *see also United States v. Ortiz*, 431 F.3d 1035, 1039 (7th Cir. 2005). Punzo does not come close to making that demanding showing. He merely points out that some of Officer Lau's testimony was contradicted. That much is true, but the contradictions were on immaterial points, such as whether Officer Lau entered the Punzo home at 1:00 pm or 1:30 pm, and whether Officer Lau counter-signed the consent form as a witness while he was at the house or later at the police station.

These do not concern the circumstances surrounding Manuel's consent. The district court was in the best position to judge Officer Lau's credibility, *see United States v. Berthiaume*, 233 F.3d 1000, 1003 (7th Cir. 2000), and it was entitled to believe him in spite of these minor discrepancies.

The next question is whether Manuel's consent was voluntary. The totality of the circumstances supports the district court's conclusion that it was. The officers did not forcibly enter the house, Manuel was not under arrest when he consented, and the officers did not threaten to secure a warrant if Manuel refused to cooperate. *See United States v. Villegas*, 388 F.3d 317, 325-26 (7th Cir. 2004) (concluding that consent was voluntary under similar circumstances). In addition, Manuel rapidly assented within minutes of the officers' entry, both verbally and in writing.

Officer Lau was not required to obtain written consent after Manuel verbally consented to the search, *see United States v. Price*, 54 F.3d 342, 346-47 (7th Cir. 1995), but the fact that Manuel consented in writing buttresses the conclusion that his consent was voluntary. *See United States v. Navarro*, 90 F.3d 1245, 1257 (7th Cir. 1996). The form advised Manuel that he could refuse to consent and that, by signing, he agreed that his consent was given "knowingly voluntarily, and,without having received any threats,, promises, or duress of any kind." *See id.; United States v. Saadeh*, 61 F.3d 510; 518 (7th Cir. 1995).

Punzo offers two reasons for finding that the district court erred in finding Manuel's consent voluntary. First, he contends that Manuel was "susceptible to coercion" because his "primary language" is Spanish. But Manuel testified in English during the suppression hearing without any evident problems. Moreover, the consent form he signed was in Spanish. Second, Punzo argues that Manuel's consent was involuntary because the police did not fill in the blank describing the scope of area to be searched before Manuel signed it. In determining the scope of a consent search, the relevant

question is "what would a reasonable person have understood by the exchange between the officer and the person who provided consent?" *See United States v. Raney*, 342 F.3d 551, 556 (7th Cir. 2003). Officer Lau testified-and the district court believed-that Manuel verbally consented to a search of both the house and the garage just minutes before he signed the consent form. It would have been objectively unreasonable for Manuel to believe that by signing a form that left blank the scope of the search, he somehow limited the scope of his verbal consent. Thus under the totality of the circumstances, Manuel's consent to search was voluntary.

Finally, Punzo contends that even if Manuel's consent was otherwise voluntary, it was tainted because it was preceded by two illegal, pre-consent entries: Agent Estes's entry of the garage and Officer Honore's sweep of the basement. If an illegal search occurred and voluntary consent followed, this court analyzes whether the circumstances of the illegal entry were sufficiently coercive to taint the consent. *See Robeles-Ortega*, 348 F.3d at 681; *see also United States v. Fields*, 371 F.3d 910, 915 (7th Cir. 2004). Establishing that the consent was not tainted is the government's burden. *Robeles-Ortega*, 348 F.3d at 683.

Agent Estes's entry of the garage-made without a warrant and without consent-was, in the words of the district court, "indisputably illegal." But Manuel's consent is nonetheless valid if the causal link between Agent Estes's entry and Manuel's consent is "so attenuated as to dissipate the taint." *Fields*, 371 F.3d at 915 (internal quotation marks omitted); *see also United States v. Valencia*, 913 F.2d 378, 382 (7th Cir. 1990). Here, there was no evidence that when Manuel consented, he was aware that the police had illegally entered the garage, or that they had already found cocaine. Because there was *no* "causal link" between the entry and the consent, Agent Estes's search did not taint the consent.

Punzo also argued that Officer Honore's sweep of the basement tainted Manuel's consent. Of course, the sweep was legal if it happened after Manuel consented to a search of the entire house, because Officer Honore's sweep would have been within the scope of the consent. But the record does not clearly establish the sequence of events, and so we will assume that the sweep preceded the consent. Punzo's argument fails nonetheless, because Officer Honore's sweep did not taint Manuel's consent. Punzo sees this case as governed by *United States v. Robeles-Ortega*, in which we held that consent obtained just minutes after five agents forcibly entered an apartment and conducted a security sweep with guns drawn while the occupants, including a four-year-old child, were forced to lay on the floor was tainted. 348 F.3d at 680. But the facts here are a far cry from that scenario. Although Officer Honore's sweep and Manuel's consent were-separated by at most a few minutes, that is where the similarity between this case and *Robeles-Ortega* ends. It is difficult to imagine how Manuel, seated on a couch in the living room, could even have been aware that Officer Honore glanced into two rooms in the basement before joining Manuel and Officer Lau upstairs. But even if Manuel was aware of the sweep, Officer Honore's check of the basement-which took only a few minutes and turned up no contraband-was not sufficiently coercive to taint Manuel's consent to search.

We AFFIRM the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE N'ORTHSRN DISTRICT OF ILLINOIS
EAS'T'ERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	Case No. 03 CR. 1075
	)	
ANIVAL PUNZO	)	

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Anival Punzo is charged,with conspiracy and possession. with intent to distribute more than five kilograms of cocaine He has moved to suppress 191 kilograms of cocaine seized from his garage and inculpatory statements that he made on the date of the seizure and nineteen months later, on the ground that the seizure violated the Fourth Amendment and that the statements resulted from the illegal seizure. The Court held an evidentiary hearing on the motion. For the reasons stated below, the Court denies Punzo's motion.

Facts

On April 25, 2002, a confidential source working with Immigration and Customs En-forceraent agents made arrangements to transport 100 kilograms of cocaine, ICE obtained for the source a Ford Expedition with a global positioning system tracking device. On the morning of April 26, agents observed the Expedition.travel to Cicero, where it

traveled down an alley and pulled at least partly into the detached garage behind the home at 3239 South 54th Avenue[1] Agents later observed the Expedition leave the garage, The Expedition was stopped by other law enforcement officers and was searched, It was found to contain ninety-seven kilograms of suspected cocaine.

Surveillance was set up around the 3239 South 54th Avenue residence, including both ICE agents and local police officers detailed to a joint task farce. Eventually the lead ICE agent made the decision to conduct a "knock and talk" to attempt to obtain consent to search the house and garage, Three officers approached the front door to the house. While this was taking place, an ICE agent, J.R, Estes, opened the door to the garage and looked in, observing several stacks of boxes which he suspected contained cocaine. This entry to the garage was indisputably illegal; Estes lacked a warrant or consent. The lead ICE agent, Lindsay (La Joie) Murphy, observed what Estes was doing, and motioned to him to quit. No information regarding Estes' actions or what he observed was communicated to the officers who were at the front door to the house, and they were unaware of what Estes had done or seen,

Chicago police officer Gerald Lau knocked on the front door, and a man answered. Lau had his gun drawn and was holding it down at his side. The man who answered was Manuel Punzo, the defendant's father. The versions of the events given by Lau and Punzo diverge sharply.

Punzo testified that when he opened the door, several officers charged inside, with guns drawn and pointed at him, and pushed him onto a sofa, yelling, "where are the people?" While two officers stayed with him, others began to go

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[1] It is unlikely *that the* Expedition could have pulled into the garage completely; as the garage was occupied by another car and stacks of boxes, including the boxes containing the cocaine

through the house. Around twenty minutes later, Punzo said, he was told to sign a paper, without being told what it was. He did not have his glasses and could not read the paper but signed it anyway, feeling he had no choice.

Lau testified that when the man answered the door, he and the other officers identified themselves as police officers, and Lau asked if they could come inside and talk to the man. The man agreed and allowed them into the house. Lau asked the man if he had any weapons and conducted a protective pat-down for reasons of safety, finding ao weapons. The man identified himself as Manuel Punzo. They asked for identification, and he showed them a driver's license which gave a. different address. In response to questions, Punzo said that the house was his son's house, that his son was at work, and that he was there to keep an eye on the house because his son expected a delivery of some sort. Lau testified that he asked if Punzo minded if they searched the house and garage, and Punzo replied that was all right. Lau obtained a consent-to-search form and, without filling in the blanks, showed it to Punzo. The form had English text on one side and Spanish text on the other. Punzo signed in the space provided on the Spanish version. Lau and another officer, Charles Honore, both signed the form as witnesses. After this was done, the other officers were advised that consent had been obtained, and a search began. In the garage, boxes were found that contained 191 kilograms of suspected cocaine.

Some time later - perhaps an hour or so—Guadalupe Punzo, the defendant's wife, arrived at the house. Before entering, she was taken to the side of the house, where she was confronted with the fact that the officers had found a large quantity. of cocaine in he garage. Mrs. Punzo began to cry. and was taken inside the house, where she, too, was asked to sign a consent to search form. By this time, however, the search was largely complete, and the cocaine had already been seized.

Mrs. Punzo was asked to telephone the defendant to ask him to come home. After he did so, he was confronted with the seizure of the cocaine and is claimed to have made several admissions. In November 2003, the defendant was interviewed by agents in Arizona, where he was then, living. He was again confronted with.the seizure of the cocaine from his garage and is again claimed to have made a number of admissions.

The consent forms evidently were completed later at the police station, likely by an officer other than Lau or Honore, The time-of-day entry on the form signed by Manuel Punzo was overwritten to show the time 1305 (1:05 p.m.), The time-of-day entry on *the* form signed by Guadalupe Punzo was originally filled in with 1430, but this was overwritten with the time 1330, and a small amount of opaquing fluid was used to cover up part of the number 4,

Manuel Punzo testified that he had originally gone to the house earlier in the morning to give someone a ride, but the person never arrived. After waiting in his car outside for a lengthy period, he returned to his own home, which was nearby, and called *the* defendant *to say that the* person had not shown up. The defendant asked Mr. Punzo to return and wait longer. When Mr. Punzo went back to the house, he went inside, using a key that was in his possession. Mr. Punzo denied he had ever lived at his son's house but stated that he had had the key for several months, from a. period when he was doing some work on the house and supervising other workers. He would use the key to let the workers inside *to* use the bathroom. Mr. Punzo admitted that he had been inside the home on other occasions when his son was not present.

Guadalupe Punzo testified that Manuel had lived in the house for about six months at an earlier point in time and had his own set of keys. She denied ever asking Manuel to go to the house when she was not

there and said she was unaware he would be there on April 26.

Discussion

The defendant argues that Manuel Punzo lacked actual or apparent authority to consent to a search of the defendant's house and garage, and *that in* any event his consent was not given voluntarily. Guadalupe Punzo's consent, the defendant argues, was obtained only after the search was completed., and only by confronting her with the fruits of *the search,* and thus it cannot justify the prior search. The defendant argues that the cocaine must be suppressed from evidence and that his own statements both on the day of the search and in November 2003 must also be suppressed as fruits of the unlawful search.

The government argues that Manuel Punzo had both actual and apparent authority to consent to the search and that his consent was voluntary. It argues that even if Mr. Punzo is found to have lacked authority or to *have* been coerced to consent, *the* discovery of the cocaine in the garage was inevitable as Guadalupe Punzo would have consented. It also argues that the defendant's statements were not tainted by *the* alleged illegal search.

The Court finds that Manuel Punzo had actual authority to consent to a search of his son and daughter-in-law's property. A search of a residence may be justified by consent given by a Non-owner "who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock* 415 *U.S.* 164, 171 *(1974).* Such common, authority [5] rests on mutual use of the property by persons-generally joint access or control for most purposes." *Id.* at 171 n.7. The government has the burden of establishing that Punzo had the necessary

authority to consent to a search. *Illinois v. Rodriguez,* 497 U.S. 177, 181 (1990).

Manuel Punzo did not live in the home at the time, but *he* had his own keys, obviously had access to the property at will (as shown by, among other things, entry into the house on April 26), had authority to allow others to enter the property (as shown by his activities when work was being done there), and had access and control over the property on other occasions relatively contemporaneously with the search (such as when he waited there for his son and daughter-in-law's children to return home from school). "[T]he foundation of third party consent is assumption of risk." *United States v. Jensen,* 169 F.3d 1044, 1049 (7th Cir, 1999) (citing *United States a Chaide,z,* 919 F.2d 1193, 1202 (7th Cir. 1990)). A person who shares property with another "'understands that the partner may invite strangers into it"; " '[d]ecisions of *either* person define the extent of the privacy involved, a principle that does not depend on whether the stranger welcomed into the [property] turns out to be a police officer or another party to the crime.," *Id.* (quoting *Chaidez, 919* F.2d at 1202). A, person who has "mutual use of the property by virtue of joint access" has authority to consent, see United States v. Kimoana, F.3d 2004 WL 2051391 (10th Cir. Sept. 15, 2004), and in this case the government established that Mr. Punzo had joint access to the home. He therefore had actual authority to consent to a search.

The Court also finds that the government has established that Manual Punzo's consent was given voluntarily. The Court did not find Mr. Punzo to be a particularly credible witness; he was evasive at several points and attempted falsely to minimize his degree of access to the home. Though the government's presentation of evidence regarding the events surrounding the officers' initial entry to the home was less than satisfactory – it presented the testimony of only one of the three officers who conducted the so-called 'knock and talk' at the

front door - Lau's testimony was credible and was sufficient to establish that the police did not rush into the home, point their guns at Mr. Punzo, push him onto the couch, or order him to sign the consent as he claimed, but rather that he voluntarily permitted them, without threats or other coercion., to conduct the search. The circumstances surrounding the completion of the blank spaces on the consent forms at the police station reflect something less than a model of careful and prudent police work, but they do not undermine the validity of Mr. Punzo's oral or written consent.

Because the Court has found that the government has proved that consent to search was given by a person with authority, we need not address the remaining issues posed by the parties' submissions. Even though Agent Estes made an illegal entry into the garage before consent was given, the government has proved that Mr. Punzo's consent was obtained completely independently from this *illegal entry,* and thus Agent. Estes' misconduct does not taint the seizure of the cocaine or the statements obtained from the defendant, *See Murray v. United States,* 487 U.S. 533, 537-38 (1988).

Conclusion

For the reasons stated above, the Court denies defendant's motion to suppress [docket # 22-1],

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MATTHEW P. KENNELLY
United States District Judge

Date: October 18, 2004

CONSENTIMIENTO DE CATEO
(CONSENT TO SEARCH)
CHICAGO POLICE DEPARTMENT

Date: 26 Apr 02

Time: 1305

Yo, Manuel Punzo , se me ha informado que tengo el derecho constitutional de negarme a que se registre el local/vehiculo descrito abajo sin antes obtener una orden de cateo (resitro). Tambien se me ha informado de mi derecho a no permitir que se registre sin dicha orden de cateo.

Despues de haber sido informado, y entendiendo en su totalidad estos derechos, por medio de la presente doy mi consentimiento a: P. O. G Lay #14579 y P. O. Honore # 13777 quiees se han indentificado como officiales del Departmento de Policia de Chicago, asignado a Narcotia Section # 189 que conduzcan uri registro (cateo) completo en este momento del locallvehrcuio que se encuentra bajo mi control legal y descrito como:

RESIDENCIA Y GARAGE

Adernas, doy mi autorizacidn y mi. consentimiento a los oficiales arriba mencionados para que obtengan yse lleven del local/vehiculo.registrado (cateado).cuaiquier material, documento, a objeto que se pueda usar en-relacion y proposito legrtimo de la. ejecucion de la

Poniendo mi firma a este documento, declare y certifico que este consentimiento. para . registrar ha sido dado a sabiendas y en forma voluntaria, por mi, a Jos oficiales arriba nencionados sin haber recibido amenazas, promesas o coaccion de ninguna clase.

Manuel Punzo

_____

(FIRMA SIGNATURE)

'ESTIGOS ITNESSES) t

Witnesses

_____

_____

CONSENT TO SEARCH
CHICAGO POLICE DEPARTMENT
DATE 26 Apr 02

TIME 1330

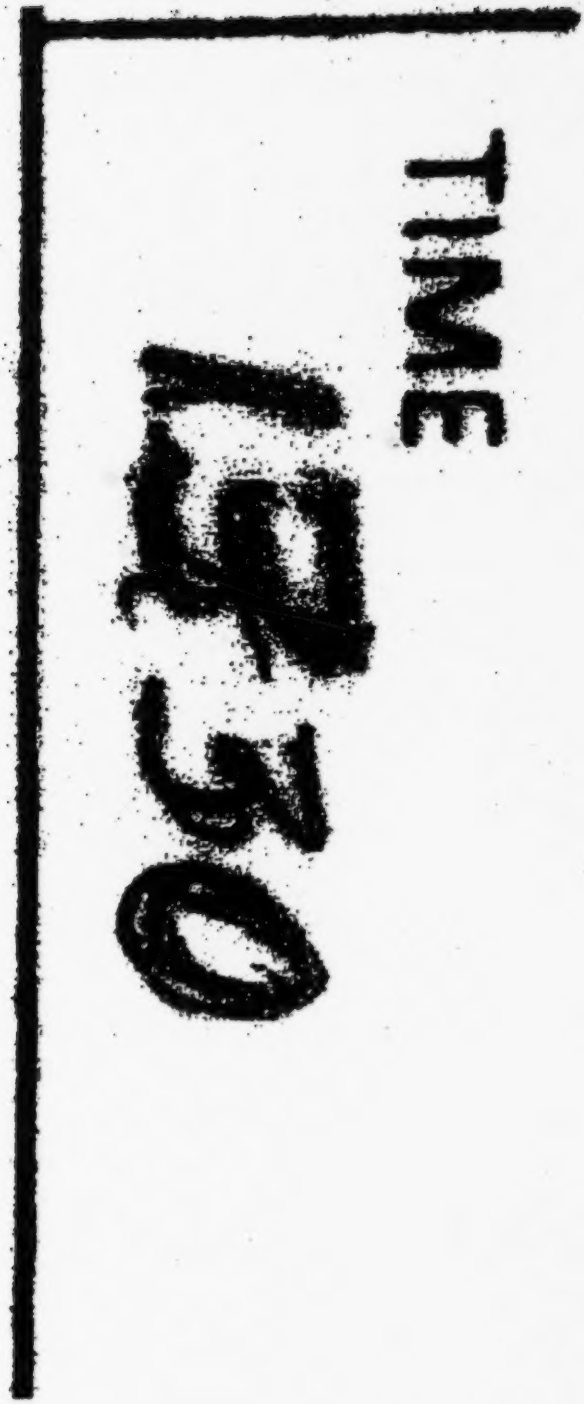
I, Guadalupe Punzo, have been advised of my constitutional right not to have a search made of the premises/vehicle described below without a search warrant first being obtained. I have also been advised of my right to refuse to consent to such a warrantless search.

Having been advised of and fully understanding these rights, I hereby authorize and give my consent to P. O. LAU # 14579 and P. O. HONORE #13888 who have identified themselves as Chicago Police Officers assigned to the NARCOTICS SECTION to conduct a complete. search at this time of the premises/vehicle under my lawful control and escri bed as RESIDENCE AND GARAGE AT 3239 S. 54th AVE., CICERO.

In addition, I hereby authorize and give my consent to the above named officers to obtain nd remove from the searched premises/vehicle any materials, documents, ar other items that cay be used in connection with a legitimate law enforcement purpose.

By my signature on this document, I. hereby state and certify that this consent to search is Ling given by me to the above named'officers knowingly, voluntarily, and without having received any threats, promises, or duress of any kind.

/s/ Guadalupe Punzo


TIME

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